

**STATE OF MONTANA**  
**DEPARTMENT OF JUSTICE**  
**AGENCY LEGAL SERVICES BUREAU**



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**MEMORANDUM**

**TO:** The Board of Environmental Review

**FROM:** Sarah Clerget, Assistant Attorney General, Board Counsel

**RE:** BER Board Duties Regarding Rulemaking

**DATE:** October 3, 2019

**INTRODUCTION**

This memorandum responds to the Board Chair's request for an analysis of the Board's Montana Administrative Procedure Act (MAPA) rulemaking authority. Board Counsel believes the Board may have authority for rulemaking in the areas listed below. This memo is accompanied by a spreadsheet listing an approximation of the BER rules currently in effect.

**ANALYSIS**

The Board has rulemaking authority in the following areas:

1. Organization and Procedural Rules (Fees and Electronic Filing)
  - Current Rule Numbers: ARMs 17.1.101, 17.4.101-636, 17.4.701-735 (fees), 17.4.801-807 (electronic filing)
  - Statutory Authority: MAPA, MCA §§ 75-1-201, 203, 205-207, 30-18-117
2. Air Quality
  - Current Rule Numbers: ARMs 17.8.101-1815
  - Statutory Authority:
    - General Board powers under 75-2-111. (*shall*)
      - Rulemaking for administration of the Act, for issuing orders under 42 U.S.C. 7419 (primary nonferrous smelters, federal

Clean Air Act) and for enforcement of 42 U.S.C. 7420 (compliance orders for violations of air emission standards)

- Create rules for access to emission data.
  - Adopt schedule of fees for permits and permit applications.
  - Classify air contaminant sources. 75-2-201 (*may*)
  - Set ambient air quality standards. 75-2-202 (*shall*)
  - Set emission levels. 75-2-203 (*may*)
  - Prohibit machine or facility used to contribute or control emissions unless permit obtained. 75-2-204 (*may*)
  - Provide rules for construction, installation, alteration, or use of device or facility that directly or indirectly causes or contributes to air pollution or that is intended primarily to prevent or control air pollution, 75-2-211 (*shall*), and for solid or hazardous waste incineration, additional requirements to -211. 75-2-215 (*may*)
  - Provide rules for operating permits in connection with the federal Clean Air Act, 42 U.S.C. 7661. 75-2-218 (*shall*)
  - Provide rules for transition on operating permits for existing sources (to have been completed by November 15, 1997). 75-2-218 (*may*)
  - Provide rules for annual adjustment of fees for operating permit applications as required by the federal Clean Air Act. 75-2-220 (*shall*)
  - Provide rules for additional permit requirements for commercial medical and commercial hazardous waste incinerators. 75-2-231 (*shall*)
  - Provide rules for noncompliance penalties. 75-2-422 (*shall*)
3. Major Facilities Siting Act (MFSA)
- Current Rule Numbers: ARMs 17.20.101-1902
  - Statutory Authority:
    - Adopt rules for the Act. 75-20-105 (*may*) [The department is required to adopt rules providing for the form and contents of and fees for amendments to applications (75-20-213) and for public review and comment on applications. 75-20-216(3)]
    - Adopt rules on test holes or other underground exploration, investigation, or experimentation on geothermal resources. 75-20-1001 (*shall*)
4. Reclamation (Strip and Underground Mining, Metal Mine, Opencut)
- Current Rule Numbers: ARMs 17.24.101-1826
  - Statutory Authority:

- The Board adopts rules on new strip and underground mines and rules on permits, reports, and other administrative and procedural matters. 82-4-111 (*shall*)
- Adopt rules on strip and underground mining (*shall*) as well as procedural rules (*may*), including those for reports, permits, and monitoring. 82-4-204, -226(8), -232(1) & (5), -233(2), & -234
- The Board *shall* promulgate rules, 82-4-321, and *may* set expenses for the review of applications for permits under this chapter. 82-4-335(3), -339
- The Board *may* establish criteria to classify amendments to operating permits as major or minor amendment and extend time periods for inspecting proposed sites. Classification substantially affects the review procedure. 82-4-337(6) & -342(2)
- The Board *shall* adopt rules on opencut mining in connection with this chapter and establish administrative procedures not enumerated in this chapter. 82-4-422(2)

## 5. Water Quality

- Current Rule Numbers: ARMs 17.30.101-1807
- Statutory Authority: MCA §§ 75-5-101 through -1122
  - (*shall*) Provide rules for administration of the Water Quality Act 75-5-201 [but not for Water Pollution Control Revolving Fund Act. 75-5-1101] including rule that:
    - describe the location and the times of the year when suction dredging is permissible
    - include a fee schedule or system for assessment of administrative penalties
  - Adopt rules to implement 75-5-301 (*shall*) including:
    - establish the classification of all state waters
    - formulate and adopt standards of water quality (must be reviewed every 3 years)
    - granting of mixing zones
    - rules implementing the nondegradation policy established in 75-5-303 (including objective and quantifiable criteria for various parameters)
  - Under 75-5-304 the Board *shall*
    - adopt pretreatment standards for wastewater discharged into municipal systems
    - adopt effluent standards under 75-5-103
    - adopt toxic effluent standards and prohibitions

- establish performance standards for new point source discharges
- *May* adopt rules to classify outstanding state resource waters. 75-5-316
- Adopt rules on discharge of sewage and waste into state surface waters and ground waters. 75-5-401 (*shall*)
- *May* adopt rate structure for operating sewage system and administer it if local government fails to do so. 75-5-514 (*may*)
- Provide rules for fees for department. 75-5-516 (*shall*)

#### 6. Public Water and Sewage Systems

- Current Rule Numbers: ARMs 17.38.101-513
- Statutory Authority:
  - Under 75-6-103, *shall* adopt rules and standards for
    - a. maximum contaminant levels
    - b. fees for department (also 75-6-108)
    - c. monitoring, record keeping, and reporting
    - d. public notice to all users of a public water system when variance, exemption, or violation under this part exists
    - e. siting, construction, operation, and modification of a public water sewage system
    - f. review of financial viability of public water or sewage systems
    - g. collection and analysis of water samples
    - h. establishing variances and exemptions under the federal Safe Drinking Water Act and this part
    - i. enforcement and penalties
    - j. review of cross-connection programs
    - k. any other requirement necessary for the protection of public health under Title 75, chapter 6
  - Adopt rules on delegation of review authority to local governments for small water and sewage systems. 75-6-121 (*may*)
  - [No rulemaking or appellate authority for Safe Drinking Water Treatment Revolving Fund Act. 75-6-201 or Title 75, ch. 7]

#### 7. Solid Waste Management (Waste and Litter Control)

- Current Rule Numbers: ARMs 17.50.101-1719
- Statutory Authority:
  - Under 75-10-106, the Board *shall*

- Adopt necessary rules, including
  - a. submission of plans for a solid waste management system [but see DEQ's responsibilities in 75-10-111];
  - b. set fees [with DEQ, see 75-10-115]

8. Agricultural Chemical Groundwater

- Current Rule Numbers: ARMs 4.11.101-1209
- Statutory Authority: MCA § 80-15-105

It should be noted that the Board has authority to hear appeals or contested cases in many areas in which DEQ has rulemaking authority (rather than the BER), including: Hazardous Waste, CECRA, Junk Vehicles, Subdivisions, Water and Waste Water Treatment Operators, Underground Storage Tanks, Asbestos and portions of the Solid Waste Program.